
Medical law reporter

Thomas Faunce*

REDUCING INJUSTICE FROM RECENT LEGISLATION SUBSIDISING INSURANCE AND RESTRICTING CIVIL LIABILITY?: BAKER-MORRISON v NSW [2009] AUST TORTS REPORTS 81-999; AMACA PTY LTD v NOVEK [2009] AUST TORTS REPORTS 82-001

Shortly after the start of the new millennium, the Howard Federal Government in Australia was faced with a so-called “crisis” in medical indemnity insurance which may, in fact, have been due to corporate mismanagement. After a four-person review by a committee chaired by Justice Ipp (who currently serves as a justice on the New South Wales Court of Appeal), it agreed to subsidise the indemnity costs of Australian doctors but the quid pro quo was tort law reform legislation in Australian States. That raft of legislation significantly reduced the capacity of people (particularly patients) who were injured as a result of negligence to receive compensation. The new legislative scheme has been criticised as unjust in extra-curial speeches by senior judges involved in hearing civil litigation in Australia. A resulting hypothesis is that, in cases involving this legislative framework, judges might attempt to make it more just through interpretations enabling the recovery of reasonable damages by injured persons. In this column two such cases involving the Civil Liability Act 2002 (NSW) are discussed. The cases in question (Baker-Morrison v New South Wales [2009] Aust Torts Reports 81-999; [2009] NSWCA 35 and Amaca Pty Ltd v Novek [2009] Aust Torts Reports 82-001; [2009] NSWCA 50), though not involving negligence by medical practitioners, are presented as possible examples of judges enhancing justice in the application of this legislation. The importance is emphasised of judges in medical and other civil liability cases highlighting the hardships and inequities this legislation is found to create for injured people, as a necessary precursor to abolition of this scheme and its eventual replacement with a presumptively more equitable no-fault scheme for compensation, particularly for medically-induced injury in Australia.

INTRODUCTION: HOW THE INSURANCE INDUSTRY MANUFACTURED A CRISIS

In the early 2000s a committee of four experts headed by Justice David Ipp (its other members being Professor Peter Cane, a torts expert at the Australian National University; Associate Professor Don Sheldon, a surgeon; and Mr Ian Macintosh, a long-time mayor of a local council) received terms of reference requiring them to examine the law of negligence with the “objective of limiting liability and quantum of damages arising from personal injury and death”. The Ipp Committee was told that it *must* assume that it was “desirable” to limit the responsibility of people who behaved recklessly *and* limit the amounts that their insurers should pay to those harmed by their careless conduct. It was prevented from examining the true nature of the insurance market and the factors responsible for the insurance “crisis”.¹

* BA LLB (Hons), B Med, PhD; Australian Research Council Future Fellow. Associate Professor, ANU College of Law and Medical School.

Correspondence to: Fauncet@law.anu.edu.au.

¹ Underwood P, “Is Ms Donoghue’s Snail in Mortal Peril?” (2004) 12 TLJ 39; Ipp Justice D, *The Politics, Purpose and Reform of the Law of Negligence* (2007), modified speech, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_ipp170507 viewed 6 April 2010.

As a direct result of recommendations from the Ipp Committee, a raft of statutes restricting the rights of citizens to bring civil liability claims was introduced by Australian State legislatures.² According to Chief Justice Spigelman of the New South Wales Supreme Court, these legislative changes were introduced in New South Wales to “restore an appropriate balance between personal responsibility for one’s own conduct and expectations of proper compensation and care”.³ A major factor encouraging these changes was the threatened bankruptcy of the largest medical indemnity defence organisation in Australia, United Medical Protection (UMP), and of one of the largest public liability and professional indemnity insurers in Australia, HIH, allegedly due to rising costs as a result of a number of large payouts.⁴ An actuarial report to a joint meeting of government ministers from the Commonwealth and the States attributed this alleged rise in insurance company expenditure to increased costs of claims.⁵ It remains questionable whether there was, in fact, any increase in the volume of civil liability litigation or related size of verdicts in Australia in this period. It appears equally likely that the insurance liquidity problems were due to poor management decisions in the industry.⁶

Chief Justice of Queensland, Paul de Jersey, has stated that these legislative changes “brought about marked erosion of a fundamental human right to personal safety and security and to receive adequate compensation” for injury caused by negligence. In an extra-curial speech he said the critical issue now was “the need for active reconsideration of whether the so-called reforms have proven justified, or should be wound back”. He stated that particularly unjust statutory changes to Queensland tort laws included caps on damages, restrictions on compensation to family and friends for free care given to injured people and limits on legal fees refundable for smaller claims.⁷ That these harsh rules had to be changed to permit compensation for the Bundaberg Hospital victims of negligent surgery arguably only highlights their injustice to other injured patients in that State.⁸

In Victoria, Justice Tom Wodak who managed the medical civil litigation list for a lengthy period after its inception in 1998, has also directly criticised the legislative restrictions on medical negligence claims, in particular the requirement that medical experts must determine that a patient has suffered permanent impairment of at least 6% due to a physical injury and at least 11% in the case of psychiatric problems, before he or she can sue. The government in his State additionally cut the period within which adults could sue for negligence from six to three years and for children from an effective maximum of 24 years to six. Justice Wodak maintained that the medical negligence litigation “crisis” supposedly driving such changes was a “myth” that had been generated by powerful lobbying from the insurance industry and the medical profession. He stated:

In Victoria, in my opinion, there was no crisis in medical negligence litigation, so far as this can be gauged from the medical list in the County Court. I do not consider that the relatively stable pattern of commencement of proceedings from year to year, until 2003, discloses any burgeoning of claims numerically, or quantitatively.

² *Civil Law Wrongs Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2003* (Qld); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); and by amendments to the *Wrongs Act 1958* (Vic) and the *Wrongs Act 1936* (SA). *Trade Practices Amendment (Personal Injury and Death) Act (No 2) 2004* (Cth).

³ Spigelman J, “Negligence: The Last Outpost of the Welfare State” (2002) 76 ALJ 432; Spigelman J, “Negligence and Insurance Premiums: Recent Changes in Australian Law” (2003) 11 TLJ 291.

⁴ Cashman P, “Tort Reform and the Medical Indemnity ‘Crisis’” (2002) 25 UNSWLJ 888.

⁵ Trowbridge Consulting and Deloitte Touche Tohmatsu, *Public Liability Insurance: Analysis for Meeting of Ministers, 27 March 2002* (2002), <http://www.treasury.gov.au/documents/314/PDF/plr.pdf> viewed 6 April 2010.

⁶ Wright T and Melville A, “Hey, but Who’s Counting: The Metrics and Politics of Trends in Civil Litigation” in Prest W and Roach Anleu SL (eds), *Litigation: Past and Present* (University of New South Wales Press, Sydney, 2003) p 96.

⁷ Australian Lawyers Alliance, “Top Judge Criticises Injury Compensation Laws”, *Media Release* (17 February 2006).

⁸ Australian Lawyers Alliance, Editorial Comment, “Top Judge Criticises Injury Compensation Laws”, *Media Release* (17 February 2006).

He pointed out there was a very high rate of settlement of County Court medical proceedings, fewer than 50 new medical claims in the Supreme Court each year and that he knew of no enormous damages payouts in Victoria.⁹

In other States, these statutory changes put limitations on medical negligence actions in the form of restrictions of the duty of care owed by public authorities, the exclusion of an action for damages in wrongful birth actions for the cost of child rearing, caps on damages for personal injury and an inability on the part of plaintiffs to give evidence to establish causation in failure to warn cases, as well as the introduction of a modified *Bolam* principle (which allowed doctors to avoid liability by bringing evidence that even a few, although not necessarily the majority of, reasonably competent practitioners would have done what they did).¹⁰ There is a particularly great potential injustice, in this context, of the Federal Government also subsidising the professional indemnity costs of doctors. One consequence, eg, is that a taxpaying patient injured through the negligence of a doctor (on standard common law criteria) would not only be prevented from suing to receive reasonable compensation but would be forced to subsidise that physician's indemnity insurance.

Given that key judges in multiple jurisdictions have spoken out against the changes, a specific hypothesis may be proposed. This is that, in cases interpreting such legislation, judges, in the best traditions of the common law and equity, may exhibit a willingness in appropriate cases to modify the statutory scheme to remedy any perceived injustice in its operation. The recent decisions of *Baker-Morrison v New South Wales* [2009] Aust Torts Reports 81-999; [2009] NSWCA 35 and *Amaca Pty Ltd v Novek* [2009] Aust Torts Reports 82-001; [2009] NSWCA 50, though not involving medical negligence, are presented here as examples of cases where judges had the opportunity to modify any injustice this controversial legislative scheme might produce through denying fair compensation for injured people. This column examines those cases to determine whether any such judicial approach is exhibited. It concludes with some suggestions about why academics and the judiciary should highlight detected injustices arising from this legislation.

BAKER-MORRISON V NEW SOUTH WALES [2009] AUST TORTS REPORTS 81-999; [2009] NSWCA 35

In May 2004, a 22-month-old child, Shakyra Baker-Morrison, was injured at Gosford Police Station when her fingers were caught between the floor and a sliding glass door. The injury required hospitalisation and significant surgery. Shakyra's mother, Mrs Baker, consulted a solicitor the day after the injury was sustained. This would normally be viewed as confirming a desire of the mother's part to promptly initiate the requisite legal processes to receive compensation. The plaintiff's case did not allege negligence of a doctor, but the decision involves the interpretation of the same tort law legislation that sought to restrict such claims by imposing more stringent limitation periods.

On advice from Mrs Baker's solicitor, further action was delayed for a period of three years and 26 days, at which time a statement of claim was sealed and issued, being served eight days later. By notice of motion filed on 27 November 2007, the respondent sought to strike out the claim on the basis that it was statute-barred, pursuant to s 50C of the *Limitation Act 1969* (NSW). Since 6 December 2002, the limitation period for personal injury actions in New South Wales had been prescribed by the *Limitation Act 1969* (NSW), Pt 2, Div 6 (ss 50A – 50F). The primary limitation period is one of three years running from (and including) the date on which the cause of action is "discoverable" by the plaintiff: s 50C(1). What is meant by "discoverable" is defined in s 50D which provides:

- (1) For the purposes of this Division, a cause of action is discoverable by a person on the first date that the person knows or ought to know of each of the following facts:
 - (a) the fact that the injury or death concerned has occurred,
 - (b) the fact that the injury or death was caused by the fault of the defendant,
 - (c) in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.

⁹ Wodak, Justice T, in Shiel F, "Medical Negligence Crisis a Myth: Judge", *The Age* (Melbourne) (2 January 2004).

¹⁰ Salem O and Forster C, "Defensive Medicine in General Practice: Recent Trends and the Impact of the Civil Liability Act 2002 (NSW)" (2009) 17 JLM 235.

- (2) A person ought to know of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact.
- (3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral or in writing, of the person.

Johnstone DCJ at first instance ordered that the applicant's claim be struck out because it had been filed out of time and in circumstances where no power to extend was available. The applicant sought leave to appeal from the judgment and orders of Johnstone DCJ. Leave to appeal was granted.

The issue for determination was thus whether the plaintiff's mother was aware, in the relevant period, that the injury to her daughter was "caused by the fault of the defendant" and that the injury was "sufficiently serious to justify the bringing of an action on the cause of action". Johnstone DCJ held that the action be struck out due to provisions in the *Limitation Act 1969* (NSW).

The effect of the amendments to the *Limitation Act 1969* (NSW), introduced by the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), was to render flexible the commencement of the limitation period for personal injury claims, but to withdraw the court's power to extend time, which might otherwise have arisen pursuant to s 60G of the *Limitation Act 1969* (NSW). That discretionary power was limited by the following section:

60I Matters to be considered by court

- (1) A court may not make an order under section 60G ... unless it is satisfied that:
 - (a) the plaintiff:
 - (i) did not know that personal injury had been suffered, or
 - (ii) was unaware of the nature or extent of personal injury suffered, or
 - (iii) was unaware of the connection between the personal injury and the defendant's act or omission, at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted, and
 - (b) the application is made within 3 years after the plaintiff became aware (or ought to have become aware) of all 3 matters listed in paragraph (a)(i) – (iii).

The case was heard by Justice Ipp himself as well as Basten JA and Macfarlane JA. The court held (at [30]-[39]) that the appellant was required to establish when Mrs Baker first knew that the damage was the "fault" of the state. This, according to the new statutory scheme, required that she take reasonable, active steps to raise her awareness as to whether the sliding door could be "rendered safe" by "a protective guard or covering along the area of operation of the ... sliding glass doors" (at [40]). In addition, it was necessary for her to take reasonable steps to determine that the damage was sufficiently serious to warrant the action.

Interestingly in terms of the hypothesis being explored here, the court considered whether the term "fault" was referring to a legal fault or a moral fault. The court stated (at [36]-[37]):

The Court was provided with no direct assistance in respect of the adoption of the term "fault" in the New South Wales Act. In the *Review of the Law of Negligence – Final Report* (2002) ("the Negligence Report"), which triggered the amendments, the particular element was identified by reference to the date on which the plaintiff knew or ought to have known that the injury "was attributable to negligent conduct of the defendant": at par 6.19. This gives credence to the view that the term "fault" was used generically to cover a possible range of causes of action, an approach consistent with the intention of the Negligence Report that the precise nature of the cause of action should not be determinative: at par 6.14.

Although the statutory test is expressed in terms of what the person "knows or ought to know" of the identified facts, the objective element was clearly and expressly identified in the Negligence Report as the primary aspect of discoverability: at par 6.28. As will be noted below, s 50D(2) identifies when a person ought to know a fact on an assumption that the person had "taken all reasonable steps before that time to ascertain the fact". Taking all reasonable steps must, in appropriate circumstances, include obtaining medical and legal advice and information. That assumption, and the significance given to it in the Negligence Report, remove any curiosity which might otherwise inhere in the conclusion that the concept of "fault" was to be ascertained by reference to legal concepts.

The court did appear to apply a broad (even "just") interpretation of the legislative requirements. It held (at [58]), eg, that in most circumstances, the step of instructing a solicitor will be sufficient for a prospective plaintiff (or the parent of a plaintiff) to satisfy the legislative requirement of taking "all

reasonable steps". It also held (at [59]) that the phrase "ought to have known" can mean either that the person informed by the putative plaintiff should have inquired as to a fact (the active sense) or that he or she should have been told of the fact (the passive sense). In this context, "should" connotes a culpable omission, either by the person who should have known, or by the other person who should have supplied advice or information. If the limitation period had been intended to commence, not because of a failure on the part of the putative plaintiff to take reasonable steps but because of the failure of another person, that could and should have been made clear. Refusing to allow the legislation to restrict the capacity to sue based on what a third party (the solicitor) ought to have known is clearly reasoning which accords with the underlying professional virtue of justice.

Similarly, the expression "ought to know" was identified by reference only to what the putative plaintiff "would" have found out, if he or she had taken all reasonable steps. That language is apt to engage the active sense of the expression only. Further, the word "would" (rather than "should") is inconsistent with any expectation of an inquiry into the conduct of the potential source of information or advice. It was not suggested that, in the 26-day period after the accident, the plaintiff's mother should reasonably have taken any step which she did not take. Accordingly, unless the plaintiff's mother in fact had the relevant knowledge, the court held that defence must fail.

AMACA PTY LTD V NOVEK [2009] AUST TORTS REPORTS 82-001; [2009] NSWCA 50

Mrs Margaret Dawson contracted mesothelioma as a result of Amaca Pty Ltd's (formerly James Hardie Pty Ltd) proven negligence in regulating the use of its products containing asbestos. Margaret Dawson's daughter, Carina, continued an action against Amaca for the gratuitous domestic services that her mother had provided for her, her husband and children. The court at first instance found that the "grandchildren were dependants of Mrs Dawson" and so compensation was awarded for the loss of those services (at [4]-[5]). This case also provides lessons about how judges are applying similar legislative restrictions on claiming damages for domestic services in professional negligence cases.

Amaca Pty Ltd appealed the decision to the New South Wales Supreme Court and submitted that if s 15B of the *Civil Liability Act 2002* (NSW) had been applied correctly the trial judge would have found that:

- the grandchildren were not dependants of Mrs Dawson;
- Mrs Dawson's services were not provided to the grandchildren, but to their parents; and
- the provision of the services was not reasonable.

The appellant also argued that the award if granted should be reduced because there were two benefits that were conferred upon the family as a result of Mrs Dawson's services: the Noveks were free to work and earn; the other was the performance of household tasks (at [5]-[8]).

The appeal thus concerned s 15B of the *Civil Liability Act 2002* (NSW). Under that provision damages are to be awarded if:

- (a) there is (or was) a reasonable need for the services to be provided, and
- (b) the need has arisen (or arose) solely because of the injury to which the damages relate, and
- (c) the services would not be (or would not have been) provided to the claimant but for the injury.

Given the provisions of the Act, Campbell JA ruled that the grandchildren were indeed dependants of Mrs Dawson and in doing so upheld the definition of "dependency" given in *Middleton v Kiama District Hospital* [1970] 3 NSW 136: dependency is not necessarily confined to a legal obligation or a financial relationship (at [45]). This was a broad interpretation conformable to justice, but not necessarily required by the legislation.

In relation to the submission that the services provided by Mrs Dawson were to Mrs Novek and her husband rather than their children, Campbell JA stated (at [50]):

There are some sorts of domestic services, such as those involved in the performance of cooking, cleaning or home maintenance, that confer the same type of benefit on all members of a household, or several of the members of a household (sometimes including the person who carries out the services). The fact that several members of the household benefit provides no reason for concluding that it is erroneous in law to say that the person who performed such a service provided a service to some particular one of those household members.

The reasonableness of the gratuitous services was challenged by Amaca Pty Ltd because of the trial judge's use of certain examples in testing for reasonableness. Amaca Pty Ltd stated that "it cannot have been the intention of Parliament that the Respondent and her husband should, in effect, receive paid childcare from the Appellant for the next 15 years" (at [58]). Campbell JA ruled that the trial judge had correctly construed the legislation and that furthermore, "for the judge to decide that the need for the services to be provided for the threshold periods of time was reasonable was not a decision on a question of law" (at [62]). This, it is argued here, was also a broad and just interpretation of the legislative scheme.

On the issue of "failure to take into account benefits to the parents", Campbell JA ruled (at [93]) that the benefit to Mrs Novek and her husband of Mrs Dawson caring for her grandchildren in terms of facilitation of full-time work and reduced housework were incidental and seeking to quantify these benefits for the purposes of awarding benefits might result in as:

grossly unfair a situation as would arise if the grandparent who provided not quite enough childcare to enable a parent to go out to work had no deduction from damages, while a grandparent who provided just enough childcare to enable a parent to go out to work would suffer a deduction in damages. It needs to be recalled that what section 15B aims to compensate is the injured claimant, for loss of the claimant's capacity. It would be bizarre if a greater loss of capacity resulted in a smaller award of damages.

BRINGING JUSTICE TO CIVIL LIABILITY LEGISLATION?

Baker-Morrison examined changes recently made to the *Limitation Act* and its application to the period of "discoverability". *Amaca* goes further in respect to compensation for dependency and domestic services and the application of s 15B of the *Civil Liability Act 2002* (NSW) in personal injury claims. The findings in both cases are directly applicable to medical negligence claims under this and similar civil liability restricting legislation in other States.

These decisions do give interesting insights into how this legislation, which has been the subject of considerable extra-curial criticism by the involved judiciary, is being interpreted.

Academic criticism of the civil liability restricting legislation discussed here has focused on how it appears to have been drafted in haste. Evidence of the latter conclusion is arguably provided by cl 11 of Sch 1 of the *Civil Liability Act 2002* (NSW), which appears to provide that Pt 3 of the *Law Reform Miscellaneous Provisions Act 1944* (NSW) continues to apply despite its repeal. It has been suggested that the complexity and difficulty of applying a wide range of circumstances in tort law, inconsistencies among State instruments and the introduction of new concepts such as "dangerous recreational activity" take time to test and sort through.¹¹

Justice David Ipp, a chief architect of the reforms, himself has since confirmed a widespread opinion among the judiciary, academics, the public and policy-makers that the legislative changes have gone too far. He has stated:

Judges at the highest level have expressed unease. The legal profession and victims' associations are unhappy and are clamouring for change. They are conducting a well-orchestrated campaign for reform. This brings about an atmosphere of uncertainty and instability ... There is a clear clash of values and interests between the different participants in the politics of negligence.¹²

How the civil liability legislative changes treat disabled children and the mentally ill are two particular focal points for claims of injustice. One effect of the recommendations of the Ipp Committee, eg, was that the interests of certain classes of disabled children were subrogated to those of industry and business groups which successfully lobbied legislators that they would only achieve affordable insurance if the legal rights of such children were removed.¹³ The Ipp Committee's report (and the legislative changes arising from it) allegedly also exhibited discrimination against Australians

¹¹ MacDonald B, "The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence" (2006) 14 TLJ 268.

¹² Ipp, n 1.

¹³ Luntz H, "Guest Editorial: Medical Indemnity and Tort Law Reform" (2003) 10 JLM 385.

with mental illness who were denied compensation in many cases simply because of their medical condition.¹⁴ Such claims of injustice mirror those involving health insurance companies in the United States which led to recent legislation prohibiting them from excluding claimants (including children) because of pre-existing conditions.¹⁵

A particular claim of potential injustice is that the Ipp Report failed to address the omissions of the Australian Prudential Regulation Authority (APRA) whose duty was to scrutinise and investigate the management and operation of the relevant insurers. Indeed, it has been argued that the terms of reference for the Ipp review and the make-up of the panel were straight from the insurers' "wish list" and that insurance companies conducted a very successful public relations campaign and deliberately created hysteria among the public to panic legislators into making laws that suit them.¹⁶ None of this background was discussed in the two cases mentioned here – yet it is clearly relevant to the purpose of the legislation.

CONCLUSION

Given the background discussed above, it is entirely plausible and predictable that judges, as is arguably evidenced by the cases in question here, should have sought to remedy some of the worst injustices of this legislation as the opportunity presents itself. This is how the common law and equity have traditionally responded to unjust statutes.

The extent to which the judges involved in these cases were aware of the controversies surrounding this legislation and the extent to which they are entitled by law to take them into account are unclear. It would be to overstate the case to say that these two cases unambiguously represent a judicial trend to remedy injustice as it arises in the recent civil liability restriction legislation in their State.

If, however, as appears to be evidenced by the extra-curial speeches mentioned above, many judges are concerned about the injustice perpetrated by this legislation throughout Australia, then there are ways in which that can be directly expressed under accepted canons of statutory interpretation in terms of analysing the intended purpose of the legislation and its history. These judicial statements could cumulatively assist in redressing the inequities of legislation that does nothing to reduce the number of patients injured in hospitals or people injured in the community by accidents, but attempts to "hush up" the problem simply by closing the judicial door on claimants and permitting the relevant insurers (in the case of medical indemnity insurers also enjoying a government subsidy) to enjoy record profits as they accumulate funds that (in a just system) would be paid out to those who need them to rebuild their lives after significant injury. Perhaps the perpetration of such a great injustice through this legislation and judicial backlash against will come to be viewed as necessary to pave the way for a no-fault compensation system in Australia. In the interests of justice and the soundness of our social fabric let's hope so.

*Associate Professor Thomas Faunce
Australian National University ARC Future Fellow*

*Ruth Townsend
Lecturer, the Australian National University College of Law and Medical School
and*

*Konrad Reardon
Research Assistant, the Australian National University Medical School*

¹⁴ Clark SS and McInnes R, "Unprecedented Reform: The New Tort Law" (2004) 15 ILJ 99.

¹⁵ Hulse C, "Obama Hails Vote on Health Care as Answering 'the Call of History'", *New York Times* (21 March 2010), <http://www.nytimes.com/2010/03/22/health/policy/22health.html> viewed 6 April 2010.

¹⁶ Insurance Reform, *Submission on Civil Liability Bill 2002* (23 January 2002).